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Questionnaire for the preparation of CCJE Opinion No. 16 on the relationship between judges and lawyers and the concrete means to improve the efficiency and quality of judicial proceedings

SUMMARY OF REPLIES TO THE QUESTIONNAIRE

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A. Professional ethics, conduct and responsibility of judges and lawyers

The replies show that all states have codes of ethics (or codes of professional conduct), and ethical principles included in various sources, but none has a joint code for judges and lawyers. Nevertheless, states all accept that ethical principles for both professions are to be found in these sources, even though they are set out separately for each.

1) Codes of conduct for each profession

Virtually all states have adopted transparent official rules on ethics (or conduct) for justice professionals. But the source and content of these principles differ according to whether they are for judges or lawyers.

For judges, in accordance with CCJE Opinion No. 3, usually there are codes of ethics, still known as 'Guidance for Judges' or 'Compendium of Professional Ethical Obligations'. In a few cases these codes cover both judges and prosecutors. Sometimes ethical rules are the result of principles in more general texts such as the Constitution (independence and impartiality of judges), staff regulations of officials, or the oath taken by judges when they assume office. Codes of ethics are usually drafted and adopted by judges' associations or the Judicial Service Commission. There is a significant number of states reporting that they have no codes of conduct for judges (Czech Republic, Luxembourg, Monaco, Switzerland and Turkey).

For lawyers, in most states the national Bar Association has adopted a code of conduct for the profession in general. In some cases, ethical principles arise out of decrees adopted by the executive (France), Acts of Parliament (Germany), a Bar Association's guidelines (Liechtenstein) or Bar Associations' disciplinary rules (Turkey). Very few states (Czech Republic, Monaco and Romania) have no code.

2) No joint codes of conduct or codes governing relations between judges and lawyers

No states have considered producing a **joint code of ethics** for lawyers and judges. The main reasons given are the following: the two professions have different functions; judges must decide impartially, whereas lawyers have to defend the interests of their clients; the rules governing judges are very different from those regulating the independent professions.

But there are **common principles applying to both professions**, since both lawyers and judges pursue a common goal, namely delivery of a high-quality judgment, able to restore social peace, with due regard for the basic principles of due process. States point out that:

- Codes of civil and criminal procedure contain rules of professional conduct governing relations between judges and lawyers (such as respect for the adversarial principle, equality of arms, and timetables for proceedings);

- Codes of conduct for judges and ethical rules for lawyers also contain principles applicable to judge/lawyer relations (independence, mutual respect, fairness, honesty, tact and courtesy, for example).

States are **not planning to produce joint codes of conduct**. Some countries report that the matter is being discussed. Similarly, no states are planning to establish codes or other instruments specifically governing relations between judges and lawyers.

3) Recognition of common ethical principles

- Many states stress the fact that there are already **instruments governing these relations**: codes of civil and criminal procedure, and codes of conduct for each profession. There are also bodies in which judges and lawyers work together on ethical questions: for example, lawyers are sometimes members of the Judicial Service Commission while, conversely, judges may sit on disciplinary boards for lawyers (Slovenia). Sometimes judges and lawyers may sit together on committees studying draft procedural law (Norway).

- As regards the **content of the main ethical principles**, states were in agreement in suggesting the following basic requirements:

  - for judges: independence and impartiality, confidentiality (duty of discretion), integrity, observance of the law, respect for court users, honesty, competence, care and fairness;
  - for lawyers: independence, no conflicts of interest, observance of the law, respect for the court, defence of their clients' interests, confidentiality, honesty, fairness, professional competence, responsibility and collegiality.

It may be noted that some of these principles are common to both judges and lawyers: independence, observance of the law, confidentiality, integrity, respect for court users, competence and fairness.

It may even be said that some of these principles also govern relations between judges and lawyers. First, **observance of the law** – and therefore of codes of procedure – and due process means that judges and lawyers must respect the adversarial principle, lawyers must voluntarily make available within the agreed time-limits the factual and legal grounds together with the relevant evidence, and judges must ask lawyers for their comments prior to making a ruling. Second, the principle of **fairness** obliges lawyers to avoid deliberately giving judges false information and delaying proceedings without lawful cause and compels judges to take account of lawyers' difficulties and adjourn hearings if necessary.

B. Training of judges and lawyers

The general idea that emerged from the replies was that all states organise initial and further training for judges and most have training courses for lawyers. But this training is determined separately for each profession and organised by different institutions. It covers substantive and procedural law, ethics and professional practice. In the light of the specific duties performed by judges and lawyers, training content is individually tailored to each branch (drafting of judgments; drafting of legal documents). In a few cases, training for judges may be open to lawyers, or seminars organised in partnership with universities may be open to all. These seminars cover legislation rather than comparative ethics or relations between judges and lawyers.

1) Initial and further training in all states for judges and lawyers

Both initial and further training of judges and lawyers have been placed on a more professional footing and have reached a high standard in all states. There are differences between the systems, but all countries believe that the quality of justice depends on the quality of training.

There are specialist training institutions in virtually all states:

- For judges, training is always provided in an institution, known as a legal service training college, academy of justice, training centre or national judicial institute. The training college sometimes also trains prosecutors (Bosnia and Herzegovina, France, Hungary, the "former Yugoslav Republic of Macedonia"), employees of the judicial administration, and Ministry of Justice staff (Albania). In a very few cases there is joint training of lawyers and judges (Germany and Norway, with judges being recruited from experienced lawyers).

- For lawyers, training is more varied. It usually takes place in law schools; sometimes it is provided by the Bar Association, and sometimes the training is by another lawyer as part of in-house training in a law firm. But the method of recruitment varies between states: some hold examinations with no preliminary preparation, while others have examinations with preparation provided by a university or the Bar Association. Lawyers usually undergo a period of practical training before starting to practise.

Training programmes are tailored to each profession but have the following areas in common: substantive and procedural law, professional rules and ethics. States have put in place initial theoretical and practical training, as well as further training, which is usually considered a right and sometimes a duty.

- *For judges*: The programme generally covers theoretical training (substantive and procedural law, and ethics) and practical training (different duties, introduction to social problems). Further training is often both national and decentralised (regional); it is provided in partnership with universities (seminars). The length of initial training varies considerably (from a few months to three years on average).

- *For lawyers*: Initial training encompasses substantive law, rules of professional practice (drafting of legal documents) and sometimes ethics; practice is gained during a traineeship of varying length (from a few months to 3 years on average). Some states have made further training mandatory (20 hours a year on average).

2) Training in professional ethics remains specific to each profession; joint training is rare

Training in issues relating to professional ethics is included in all programmes, but each profession normally takes care of its own training. Joint sessions for judges and lawyers are uncommon and usually not mandatory. States have reported some examples: joint seminars have been organised; lawyers take part in some training courses with judges, sometimes as trainers; some courts of appeal organise joint training with Bar Associations and universities. Judges may also do a placement in a law firm during their initial training.

With the exception of two states, none was planning to organise joint training for judges and lawyers.

C. Efficiency and quality of judicial proceedings

In all countries, interaction between the judge and parties to the proceedings, represented by their lawyers, is governed by codes of civil procedure. Rules of procedure define the office of judge, co-operation with lawyers (to lay down the 'timetable' for proceedings, for example), and arrangements for production of documents. Judges and lawyers may often decide on a friendly settlement to bring proceedings to an end. A judge must always respond to parties' requests, but he or she may find a request inadmissible, without considering its merits, if it does not comply with rules of procedure (for example, the principle of full disclosure at the start of proceedings). Lawyers may use rules of procedure to delay the outcome of proceedings even though codes of procedure provide for penalties. These objective factors (codes of procedure, laws) appear to be necessary to regulate these relations, although all states emphasise subjective human factors (mutual respect and understanding between the professions).

1) Judges and lawyers interact in civil proceedings

- In the conduct of the proceedings: All **codes of civil procedure** lay down rules for the interaction of judges and lawyers: determination of time-limits, case-management discussions and timetables, committals and adjournments; alternative dispute resolution; case management meeting. These rules are governed by the adversarial principle and the right to a hearing within a reasonable time. Such rules are not always applied in the same way by states, but generally timetables are set with lawyers' consent and are discussed with the parties. They are discussed at the start of proceedings or at an initial hearing. They may be negotiated by the president of the court with the Bar Association to establish good practice.

Parties and lawyers may **often 'negotiate' certain stages** of the proceedings using the timetable (determining time-limits for exchange of claims, pleas and documents) to prepare cases for trial. Judges and lawyers are accordingly instrumental in the proper administration of justice (hearing within a reasonable time) and protection of parties' private interests (recognition of the rights of the defence).

- For the submission of documents, evidence and pleadings: Codes of procedure lay down communication procedures for judges and lawyers. Usually communication is in writing, by post, or by telephone; it often occurs at the hearing between judges and lawyers. Electronic communication by Internet, e-mail or fax is sometimes possible (but more uncommon, since only a few states are developing e-justice).

- As regards friendly settlements, interaction is growing: courts sometimes hold mediation hearings, and there are conciliation procedures, particularly in family cases (and also in criminal cases, with plea bargaining). Settlements can be approved by the court, in which case they are binding and enforceable.

- A **judge to whom a request is referred must always respond**. However, if the lawyer does not comply with the requirements as to form, timing and inter partes proceedings laid down by the code of civil procedure, a judge may **rule the request inadmissible** (that is, **dismiss it without considering its merits**). For example, a judge may find inadmissible any requests not lodged within the time-limit set by the case management timetable or any submissions not fully disclosed at the start of proceedings. A judge may also reject documents not made available to the opposing party in timely fashion. These procedural provisions allow a judge to **penalise lawyers** who fail to respect the guiding principles of the proceedings (adversarial principle, hearing within a reasonable time and observance of the case management timetable).

- **Lawyers can always resort to strategic manoeuvring** to delay delivery of a judgment by means of procedural law (request for adjournment of the hearing or reopening of the proceedings; late production of evidence; change of counsel; raising of procedural objections; or lodging of appeals). But usually the code of procedure enables judges to penalise such behaviour (refusal to adjourn a hearing, fines for abuses of procedure, inadmissibility of new submissions or documents, dismissal of appeals by means of filtering).

2) The factors of successful interaction between judges and lawyers

- **Objective factors** are considered **fundamental** by all states. They cover the law in general, codes of procedure, local practice in some cases, and substantive and procedural law. These are the provisions that specify the instruments organising and governing relations between judges and lawyers and define the two offices and applicable penalties. Legal certainty and equality of arms necessitate clear and understandable rules.

Some states also mention periodic meetings between governing bodies of the courts and Bar presidents to discuss general issues and specific problems.

- **Subjective factors** play an important role. They include mutual understanding, joint training, acceptance of each other's roles, personal investment by judges and lawyers, a common culture, a judge's acumen, the 'human' factor, a shared willingness to work together, a high degree of professionalism and high moral standards, and negotiation of 'procedural agreements' signed by presidents of courts and local Bars in order to define 'good practice' and rights and obligations.

Most states consider relations between judges and lawyers to be **satisfactory.** The problems recorded, especially in criminal cases, have various causes, such as inappropriate personal conduct and cases of unjustified defence. A **common culture and mutual understanding** should be developed, and judges should understand that a lawyer's first duty is to defend his or her client. Better **ethics training** is important (mutual respect, tact, restraint).

D. Role of judges and lawyers in responding to the needs of parties

Judges and lawyers co-operate in responding to the needs of parties by promoting friendly settlements of disputes through their conduct of the case management. Mutual understanding of each other's roles and needs is facilitated by possibilities for switching between the two professions.

1) Co-operation between judges and lawyers is reflected in the conduct and outcome of proceedings

- Firstly, in most states it is possible to terminate proceedings by **a friendly settlement** with the help of the judge and the lawyers. Judges may suggest a friendly settlement, encourage mediation or compromise, or themselves play a part in reconciliation. Judges can stay proceedings or adjourn a hearing to find a settlement. In most cases they approve the settlement reached in this way in order to make it enforceable.

- Secondly, co-operation helps decide on the procedure to be followed: in the **preparation of civil cases, judges co-operate with lawyers** to set the timetable for the proceedings. Sometimes the president of the court holds a meeting or preliminary hearing with the lawyers in order to determine the difficulty of the case and lay down a timetable tailored to the parties' needs (obtaining evidence, problems of the case, large number of parties).

2) Improving mutual understanding by making it possible to switch between the professions

The **opportunity to switch between the professions** improves mutual understanding and adds to a common culture. Change in both directions is possible, but there are no specific figures.

Judges may become lawyers (upon retirement, for example; a certain length of experience as judge may be required; but a switch is sometimes impossible, as in Monaco). Lawyers can become judges: often they have to sit an examination, undergo a period of training or be accepted by the Judicial Service Commission. In a very few cases (as in Luxembourg and the United Kingdom), all judges were formerly lawyers. In Norway the figure is 40%.

Lawyers can very rarely become "substitute" judges: in a few cases they may make up a court's full complement in the absence of a judge, or they may be local magistrates for a limited period.

E. Judges, lawyers and the media

States report that the media are interested not in relations between judges and lawyers but rather in individual cases, especially criminal ones. Judges provide no information on cases because they are bound by professional secrecy, the duty of discretion and the requirement to be impartial. Some courts provide information through a press contact judge. Lawyers are free to comment in the media but must respect the authority of the court.

1) No discussion of judge/lawyer relations

There is no media discussion of relations between judges and lawyers. The media show an interest in certain trials, criticise the conduct of proceedings, challenge the impartiality of certain judges, especially in criminal cases, and sometimes disparage judges.

2) Considerable media freedom for lawyers, very little for judges

In all states, judges observe professional secrecy and the duty of discretion and do not comment in the media on cases in progress or judgments delivered. To ensure transparency of justice, most systems have established a 'press contact judge' for their courts, a judge who provides information and offers neutral and objective

explanations of cases. This role is sometimes assigned to a public prosecutor, court spokesperson or the president of the court. Lawyers, on the other hand, are free to communicate, provided that they respect the rules of professional conduct (respect for the court, dignified attitude). Many lawyers comment on cases in the media and criticise judgments.